Prosecuting family violence

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Policy statement and principles

What

Family violence is a subset of family harm which includes physical, sexual or psychological abuse within domestic relationships. There may be behaviour that is coercive or controlling and causes cumulative harm.

Family harm is a high priority for Police and reducing the impact of family harm episodes is a key Police priority. Police is committed to a prompt, effective and nationally consistent approach to family harm in collaboration with other agencies and with community partners.

Prosecuting family violence offences is one mechanism that aims to reduce the impact of family violence and family harm.

Why

Family harm is responsible for approximately 17% of Priority 1 calls for Police service and approximately 40% of Police time. The New Zealand Crime and Safety Survey (2014) identified 76% of family violence is not reported meaning the amount of family harm in New Zealand is significant.

There are wide reaching societal consequences of family harm including crime, poor physical and mental health and poverty. The costs of failing to address family harm are extremely high. When attending family harm episodes Police aim to:

- slow and eventually stop the family harm cycle/cumulative harm across generations
- reduce serious harm such as the use of physical violence, sexual abuse, and child abuse and neglect
- reduce family harm related deaths (homicides and other related offences and suicides).

Police support the purpose of the Family Violence Act 2018 (s3) which is to stop and prevent family violence by:

- recognising that violence, in all its forms, is unacceptable;
- stopping and preventing perpetrators from inflicting family violence; and
- keeping victims, including children, safe from family violence.

Police will also be guided by the principles set out ins4 which guide the achievement of the Act's purpose.

Prosecuting family violence is one way in which PPS can contribute to slowing and eventually stopping the family harm cycle, and preventing future victimisation.

How

This 'Prosecuting family violence' chapter outlines the steps Police and the Police Prosecution Service (PPS) will take when prosecuting a family violence matter.

PPS will contribute to providing an effective response to family harm. This includes operational police and prosecutors working together to ensure quality family harm investigations are completed to the highest standard. We will collaborate with our partners (internal and external) and hold family violence offenders to account to achieve successful outcomes for victims.

Where charges result in a judge-alone trial, operational police and prosecutors will work together to ensure victims are informed and supported to enable them to give the best evidence and to ensure their safety.

Police prosecutors will ensure that:

- victim safety is the primary consideration in bail decisions (sections 8 and 21 Bail Act 2000 (Bail Act) and the need to protect protected persons is paramount consideration when charged with a breach of protection order (s 112 Family Violence Act)
- victims' views have been obtained by the officer in charge for first appearance (ss 8 & 21 Bail Act)
- victims of s29 Victims' Rights Act 2002 (VRA) offences are contacted as per s34 of the VRA after every court appearance
- all prosecutions adhere to the Solicitor General's Prosecution Guidelines (evidential and public interest tests)

- the court has all the information it needs to sentence appropriately
- when dealing with family harm matters, prosecutors are cognisant of the complex dynamics involved in family violence and remain open minded and non-judgmental, aiming to achieve the best outcome for the victim.

Overview

Purpose of this chapter

This chapter provides instructions and practical guidance for Police prosecutors on dealing with prosecution cases involving family violence.

The chapter focuses on the **differences** between family violence and other types of prosecution, covering in particular:

- family violence-related factors regarding the evidential and public interest tests for prosecution
- how to determine appropriate charges
- factors to be considered in bail applications in family violence cases
- use of the static assessment for family violence recidivism (SAFVR) and total concern for safety measures in family violence prosecutions
- dealing with breaches of court orders particularly protection orders.

Related information

The chapter must be read in conjunction with the:

- Police Family Harm Policy and Procedures
- PPS Statement of Policy and Practice
- Police Prosecution Service (PPS) Court Manual

See the Police Family Harm Policy and Procedures for:

- definitions relating to family violence used in this chapter
- the principles guiding the Police response to family harm episodes
- an outline of the characteristics and different types of family harm
- the procedures for responding to and investigating family harm episodes.

Audience

The chapter is aimed at Police prosecutors dealing with family violence cases. Where tasks are the responsibility of the officer in charge (OC) of the case rather than the prosecutor, this will be stated.

PPS role in addressing family violence

Operational police and PPS

Operational police are responsible for investigating family violence allegations, gathering evidence, obtaining victims views on bail and initially charging the alleged offender. However, responsibility for all post-charge prosecution decisions rests with the PPS, not with the victim or operational police.

Prosecutor's role

The prosecutor's role includes:

- reviewing the evidence
- determining whether the charge is appropriate
- determining evidential sufficiency and public interest when deciding whether to continue a prosecution according to the Solicitor-General's Prosecution Guidelines
- prosecuting on behalf of the public in accordance with the PPS Statement of Policy and Practice, which aligns with the Solicitor-General's Prosecution Guidelines; and
- notifying victims via the Inform app s29 application on the outcome of bail.

Prosecutors can also provide pre-charge advice to operational police (this is encouraged) to assist them in determining whether there is evidence of offending and, if so, what charges could be appropriate. This can be important in family violence situations where a range of offence types can apply, including those having a psychological nature.

If reviewing a case examine the available evidence. Do not base your review on anecdotal evidence given by the OC as this can create issues if the file does not match the representation made by the OC. These files must still be reviewed again prior to case review and the prosecutor can change their view if the file does not meet the Solicitor-General's Guidelines.

Withdrawing charges

Given the risks posed to victims and to the organisation, where it is determined that a charge should be withdrawn or significantly amended, prosecutors should consult with:

- the District Prosecution Manager and seek authority before taking any action; and
- notify Family Violence Coordinators/Family Harm Specialists prior to withdrawing or significantly amending charges to ensure ongoing safety planning, that the victim is informed and that relevant support services are involved, if required.

It is important to note that the PPS do not have 'no-drop policies' or mandatory prosecution of family violence cases if there is no evidence to support the charge.

Family Violence Courts

Court-based approaches to adjudicating family violence cases

Family Violence Courts are District Courts dedicated to dealing with family violence prosecutions. There may be variations in the purposes of the courts and processes in some localities.

Family Violence Courts were established by the judiciary in response to community concerns about the increase in family violence cases. They deal with criminal cases relating to family violence and are held at a regular time and place in the District Court.

Two key purposes of the Family Violence Courts are:

- getting defendants to take responsibility for their actions and to think about how they affect other people
- promoting victim safety.

A key part of the Family Violence Court is to hold defendants accountable for their actions and to encourage them to address their violence in an appropriate way. For example, defendants, who enter a guilty plea, are entitled to self-refer to a court-funded non-violence programme or attend drug and alcohol counselling (before sentencing).

Victim advisors are a core part of the Family Violence Court process and can put the victim's views to the court, assist victims with applying for protection orders, advise victims about their rights and help them participate in the court process.

Defendants are encouraged to address their substance and violence issues through programme participation. Victim advisors ensure that victims know they can be advised of the progress of their case through the court. They can assist victims to access support, government or community agencies and the police.

Prosecuting in Family Violence Courts

All prosecutions must adhere to the Solicitor General's Prosecution Guidelines. Therefore only cases that pass the evidential and public interest tests should be prosecuted.

The PPS do not have 'no-drop policies' or mandatory prosecution of family violence cases if there is no evidence to support the charge. The fact that there are specific Family Violence Courts does not change the need for the PPS to follow the Solicitor-General's guidelines.

Family violence prosecutors

All prosecutors must be skilled in prosecuting family violence cases. Prosecutors assigned to Family Violence Courts in particular must:

- be familiar with and understand the particular characteristics and dynamics of family harm. This includes being familiar with the information in this chapter and taking part in relevant training
- be up to date with the latest family violence legislation, precedent and theory
- have a working understanding of the Police Family Harm Policy and Procedures
- be able to balance your role as a prosecutor with the purpose for which your particular Family Violence Court has been established. These are not opposing roles but rather a slightly different way of working within the court environment
- have good working relationships with judges, the OC case, Family Violence Coordinators/Family Harm Specialists, court victim advisors (CVAs), and victim advocates from non-government organisations; and
- be skilled in working with victims of family violence and supporting them to give the best possible evidence.

Key working relationships

Officer in Charge of Case

Working well with an OC case is extremely important. They gather the information required for effective prosecution decision-making and maintain a close relationship with victims and witnesses. You must be able to advise and receive advice from the OC case while maintaining your independent decision-making ability.

Cases built around the victim's evidence are common but can be problematic, because cases are invariably prosecuted:

- during the 'honeymoon' phase of the pattern of family harm, when the defendant is contrite and can influence the victim not to give evidence, or
- in a climate of fear, when the victim is wary of repercussions from providing evidence.

See information on corroboration in File standards for examples of evidence that, if collected in a timely manner as a result of a quality family harm or other investigation by operational staff, will help to build a case that is independent of the victim's evidence, and may aid in continuing a case without the victim's evidence, if necessary or appropriate.

Family Violence Coordinators / Family Harm Specialists

Family Violence Coordinators/Family Harm Specialists work closely with community-based multi-agency tables aimed at preventing family harm (ie. the Family Violence Inter-Agency Response System (FVIARS), Whangaia Ngā Pa Harakeke (WNPH) and the two Integrated Safety Response (ISR) pilots). Working with this system (through a Family Violence Coordinator/Family Harm Specialist) can be helpful to a prosecution. No single agency has all the required information surrounding family violence victims and offenders, and the ability to obtain, or provide, additional information may assist in ensuring effective responses relating to offenders and victims within the court and Police processes.

Multiple agencies can provide support for the victim(s) from the investigation to the disposition of the case. This support enhances the likelihood of the victim telling their story in court, and increases the chance of a successful prosecution.

In some areas, Family Harm Teams, which are also a focused multi-agency approach, bring together child and victim advocacy agencies with the Police to develop improved responses to complex risk cases of family harm.

PPS District Prosecution Managers must liaise with District Family Violence Coordinators/Family Harm Specialists to foster effective relationships at the district, area and local levels. The aim of this interaction is to build better networks for prosecuting family violence cases.

Court Victim Advisers

Ministry of Justice CVAs have an important relationship with victims at the time of the court hearing. They:

- provide information to the victim about the case relating to them
- advise victims about their rights in the court process, and
- help victims to participate in the court system.

However, this role should stop short of advocating for the victim. Victim advocacy is undertaken by other non-government organisations such as Victim Support and Women's Refuge.

District Prosecution Managers liaise with CVAs to confirm local processes for managing the transfer of efficient and timely notice of a victim's intention to no longer pursue a prosecution against the defendant. This is an early warning service provided by CVAs to both prosecutors and the OC case.

Is there sufficient evidence to prosecute?

Test for prosecutions

Prosecutions can only be conducted where the test for prosecution is met. This means that:

- the evidence which can be adduced in Court is sufficient to provide a reasonable prospect of conviction (the **Evidential Test**); and
- prosecution is required in the public interest (the **Public Interest Test**). (See the Solicitor-General's Prosecution Guidelines and the PPS Statement of Policy and Practice).

Applying the evidential test in family violence cases

To meet the evidential test, there must be in relation to an identifiable individual, sufficient credible evidence which the prosecution can adduce before a court and upon which an impartial jury (or judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence (ie. there has to be a reasonable prospect of conviction).

Review of charges

Review the appropriateness of the charges when considering the sufficiency of the evidence. Even the most reliable evidence will be ineffective if the charges do not reflect the facts of the offending. (Reviewing charges is dealt with in more detail in Charging decisions and Accepting pleas and diversion in this chapter).

Responsibility for final decision to prosecute

Prosecutors are responsible for making the final decision as to whether a case should be continued, and if so, what the charges will be and how the case will be managed. If charges are to be significantly amended or withdrawn, you must follow instructions outlined in this chapter (withdrawing charges). - consult your District Prosecution Manager and notify Family Violence Coordinators/Family Harm Specialists prior to withdrawing or amending to ensure ongoing safety planning, that the victim is informed and that relevant support services are involved, if required.

Is prosecution in the public interest?

The general rule

Once the evidential test is met, you must consider the public interest in prosecuting. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest. However as a general rule, the public has a significant interest in ensuring all family violence cases are prosecuted, offenders are made to account for their behaviour, and victims are protected from further violent offending.

You should proceed with a case when the charges are serious and the evidence is strong, even if this is against the victim's wishes. While the victim's views are relevant, they are not binding on the prosecutor's decision. You should aim to balance the victim's views and the public interest.

Public interest factors to be considered

When considering public interest in family violence cases, refer to the Solicitor General's Prosecution Guidelines and consider these factors simultaneously:

- the seriousness of the offence including:
  - the gravity of the maximum penalty
  - the anticipated penalty/sentence
- the seriousness of the offending including:
  - the extent of the victim's physical injuries
  - any psychological abuse
  - whether the defendant planned the attack, used weapons and/or made any threats before or after the attack
  - the prevalence of the alleged offence and the need for deterrence
- the context of the offence, including the:
  - state of the victim's relationship with the defendant
  - history of the victim's relationship with the defendant (eg. any prior police callouts, charges filed?)
  - defendant's degree of culpability
  - presence of any children at the time of the offence and the effect on them
  - any protection, parenting or supervised contact orders
  - risk of further offending by the defendant
  - perceived risk to the victim and children of a prosecution not proceeding
- the defendant's history, including:
  - their criminal history in respect of previous relationships (including breaches of other protection orders)
  - other offences, particularly ones involving violence
  - previous interventions that have occurred (eg. previous referrals to non-violence or alcohol and drug programmes, including attendance at and completion of those programmes)
  - previous relevant diversions and cautions
- any other relevant circumstances, including:
  - the affect the prosecution is likely to have on the physical or mental health of the victim and/or witnesses
  - the age of the defendant
  - whether the defendant was at the time of the offence suffering from significant mental or physical ill health
  - whether any proper alternative to prosecution exists eg. diversion
- other mitigating or aggravating circumstances related to the offence.

None of these factors, or any other that may be relevant to a particular case, is necessarily determinative in itself - all relevant factors need to be balanced.

Considering the victim's views

Given the dynamics of family violence, you should always consider 'the views of the victim of the alleged offence to the

prosecution'. You can gain the victim's perspective directly (where possible) or from the OC case, the CVA or information supplied on the case file such as the victim impact statement.

The interests of victims are crucial, but they are not the final word in family violence prosecution decisions. That rests with the prosecutor who is prosecuting on behalf of the public. In coming to your decision, you must try to balance the victim's interests with wider societal interests and the risks to other people (particularly children).

Charging decisions

Reviewing charges

When reviewing charges relating to family violence, you must consider the general charging principles (below) and the:

- nature of the offending and the impact the charge(s) will have on reducing reoffending
- safety of the victim and any children affected by the offending
- need to hold the offender fully accountable for the violence - not doing so might be construed as condoning violent behaviour
- importance of never minimising violence.

General charging principles

Consider the general principles in the table below when reviewing the appropriateness of charges and consider:

- do the charges appropriately reflect the violence that has occurred (without minimisation)?
- do the charges reflect the essential nature of the offending?
- is there evidence that can be adduced in court that will provide a reasonable prospect of conviction for those charges?

Principle	Description
Seriousness	Take into account the aggravating and mitigating features of the case when considering seriousness.
File charges appropriately	Do not proceed with a more serious charge just to encourage a defendant to plead guilty to a less serious one. Alternatively, never file a less serious charge than is appropriate to ensure a guilty plea.
Never file more charges than are necessary	Never proceed with more charges than are necessary just to encourage a defendant to plead guilty to a lesser number of charges.

Linking family violence behaviour to common offences

Family violence is a unique type of offending. Both the offender and victim are often intimately linked in a cycle of destructive behaviour that fosters the offender's power and control over their victim. In many cases, the offender harnesses the trust, commitment and privacy afforded by a family environment to perpetuate the cycle of violence.

The appropriateness of charging for family violence should, therefore, take into account a range of offences capable of properly reflecting the nature of the offending.

See the 'How and when you charge makes a difference' guide (see below and also available in custody and work areas) for links between family violence offending and a range of possible charges applicable.

How and when you charge makes a difference (July 2019) **24.11 KB**

Determining the charge

Make sure offenders are charged and prosecuted in a way that reflects the essential nature of their offending and the continuing risk they pose to their victims. Remember you should select the charge that reflects the provable evidence. Having determined the offender's intent, select the appropriate charge.

For further guidance on selecting the right charge across a variety of offending scenarios:

- see the example below; and
- download the description for 'How and when you charge makes a difference'.

Example – determining charges for an offence

Offending scenario

A woman is assaulted at home by her ex-partner. When they arrive at the home, police find the woman unconscious on the floor with blood coming from her nose. Police interview the offender, who admits to punching the victim in the head.

When the victim wakes, she claims she was punched in the stomach, fell over and was then kicked in the head by the offender. An examination of the offender's boots shows blood on them.

A subsequent medical examination of the victim reveals that she has a severe bruise on the back of her skull that is consistent with having been kicked. The victim is kept in hospital overnight and treated for severe concussion. No x-ray is taken. Three weeks after the assault and after several headaches, the victim is re-examined. It is discovered that she has a cracked skull.

When police confront the offender at a formal interview with the victim's claim that he kicked her in the head, the offender claims he only kicked her lightly and did not intend any serious damage, because if he had she would be dead now.

Answer the three questions below to determine the appropriate charge.

What was the offender's intent?

The offender has not admitted that he intended to cause serious harm. Can police prove that his intent was to cause bodily harm, which is what he caused by cracking the victim's skull? The offender's action that caused the serious harm was one kick to the victim's head, which shows a clear intent to injure. However, it cannot be said that it shows a clear intent to cause grievous bodily harm.

It is possible police could prove the offender was reckless whether or not he caused grievous bodily harm, because he did kick the victim in the head with his boots on. That amounts to a reckless disregard for safety.

Therefore, the highest level of intent police can prove based on admissions and actions, is an intent to injure.

What was the degree of force used?

A punch to the victim's stomach followed by a kick to the head of a victim who is on the ground by a person wearing boots is a relatively high level of force. However, it does not establish a very high level of intent because only one kick was directed to the victim's head, rather than several kicks or stomps to the head more commonly seen in cases where there is an intent to cause grievous bodily harm or death.

What was the result or degree of injury received?

Based on the medical reports, the amount of force applied to the victim was sufficient to render the victim unconscious and cause concussion, a bleeding nose and a cracked skull. A cracked skull can fairly be described as serious harm qualifying as grievous bodily harm within the meaning of s188 of the Crimes Act.

What charge is most appropriate to the provable facts?

A charge of common assault under the Crimes Act is inappropriate because the conduct is too serious, and assault on a person in a family relationship is not suitable because it does not reflect the intent or results of the assault. On an overall assessment of the seriousness of the offending (the amount of force used, provable intent of the offender and effects on the victim), the most appropriate charges appear to be:

- causing grievous bodily harm with intent to injure
- causing grievous bodily harm with reckless disregard for safety.

Both offences are found in the s188(2) of the Crimes Act, and both are punishable by up to seven years' imprisonment, and carry a warning under the 'three-strikes' regime.

Parental control prosecutions – section 59 of the Crimes Act

See the Parental control (section 59 Crimes Act) chapter on the Police policy position related to the s59 defence.

Dual defendants

Dual defendants can occur when it is unclear who the actual aggressor or victim is, there are counter-allegations, and both parties are arrested and charged.

Particular caution must be used in cases with dual defendants because they may involve complicated dynamics and issues. This can present difficulties in prosecuting, so the facts in both cases must be carefully examined. It can be hard (and is not always possible) to determine the aggressor.

Factors to consider

When handling cases involving dual defendants, take into account these key factors:

- the comparative severity and type of any injuries inflicted by the parties
- whether a protection order has been issued
- whether either party has:
    - made threats of harm to the other party, a child or children, or another family member
    - a history of violence
    - made previous counter-allegations
    - acted defensively to protect themselves or a third party from injury
- the likelihood of further injury to each person
- the views of the investigating officer.

Bail

Introduction

The Bail Police Manual chapter contains detailed instructions and guidance for:

- the OC case to:
  - decide whether to grant Police bail
  - determine appropriate bail conditions
  - decide whether to oppose bail when defendants are not bailable as of right
  - prepare effective opposition to bail applications
- prosecutors to:
  - review bail opposition forms to ensure compliance with the legislative requirements of the Bail Act, Victims' Rights Act and relevant case-law
  - check any available FV history to identify risk indicators
  - oppose bail applications in the District Court.

The following information on bail is aimed at prosecutors and identifies areas of the bail process where because of the particular nature of family violence offending, prosecutors particularly need to focus their attention.

Police bail for family violence events (other than breach of protection orders or related property orders)

In deciding whether to grant police bail in family violence cases, the primary consideration for Police is the need to protect the victim of the alleged offence and any person in a family relationship with the victim (s21(2A) Bail Act). If the defendant has been charged with breach of a protection order or related property order, Police's paramount consideration must be the need to protect every protected person (s21(3) Bail Act). Consider the victim's safety and the possible need for the defendant to have a cooling off period to ensure the victim's safety. **You must have the authority of a supervisor of or above the position level of sergeant before releasing a family violence defendant on Police bail.**

Note that a person arrested under and charged with breaching a protection order pursuant to ss 112 & 113 of the Family Violence Act must not be released on Police bail (s21 Bail Act) within 24 hours of arrest (s23(1) Bail Act). This does not affect the obligation of Police to bring a person charged before court as soon as possible.

Court bail – factors to be considered by the court

In addition to the usual considerations under the Bail Act, the primary consideration for the court in deciding whether to grant bail for family violence offences is the need to protect the victim and any particular person or people in a family relationship with the victim (s8(3A) of the Bail Act). Where a defendant is charged with a breach of protection order, the court's paramount consideration is the need to protect every person who is protected by that order (s8(3C) Bail Act).

If a defendant is charged with an offence under section 194 of the Crimes Act (assault on a child, or by a male against a female) or section 194A (assault on person with whom the defendant is in or has been in a family relationship with) the defendant is not bailable as of right (s7 Bail Act).

Victim's views about bail

The court **must** take the victim's views about bail into consideration for specific offences referred to in s29 of the Victims' Rights Act. These include an offence:

- of sexual violation or other serious assault
- that resulted in serious injury to a person, the death of a person, or a person being incapable
- that has led to the victim having ongoing fears on reasonable grounds for their physical safety or security, or for the physical safety or security of one or more members of their immediate family.

(These offences often apply in family violence cases) (s8(4) Bail Act)

Section 30 of the Victims' Rights Act also requires prosecutors to ascertain any views a victim covered by s29 of that Act has

about the bailing of a person accused of an offence against them.

Deciding whether to oppose court bail

When deciding whether to oppose bail in family violence cases, consider in addition to the section 8 factors:

- the need to ensure the victim and their family's safety, and any safety plan in place
- the victim's views on their safety and their level of fear if the defendant is released on bail
- the recommendations of the OC case
- the injuries sustained by the victim and the general seriousness of the offending
- damage to property, which has been done to threaten the victim
- any risk-related information (eg. SAFVR and total concern for safety measures)
- previous history, including family harm related calls for police assistance and other offences or charges involving violence or threats of violence
- the influence of alcohol or other drugs on the episode and relationship
- whether any of the following exist, which may increase risk for the victim:
    - a recently served protection order
    - the victim is considering separating from the defendant
    - the victim is in a new relationship.

Make your decision on opposing bail based on the Bail Act's primary risk considerations. These include the need to protect victims, children and other witnesses from the risk of danger, threats, pressure or acts by the defendant that might obstruct the course of justice. When there is a charge of breach of protection order or related property order, the safety of the protected person is the paramount consideration (s8(3C) of the Bail Act).

Consult with the OC case as appropriate, to ensure all assessment factors are properly addressed. The Family Violence Coordinator/Family Harm Specialist may also be consulted and provide supporting documentation for bail opposition. Only present written opposition to court using the POL 128 Police Opposition to Bail form.

No-contact on remand (family violence offences)

Section 168A of the Criminal Procedure Act 2011 comes into force 1 July 2019 and applies to defendants charged with family violence offences who are remanded in custody. This provision allows a judicial officer to impose conditions on a defendant remanded in custody to have no contact with the victim of the offence, or any other person specified by the judicial officer, or both.

Where bail is opposed and the offence is one of family violence OCs should ensure when they complete a bail opposition that they seek a non-contact condition with the victim of the offence or any other relevant person. Prosecutors should also ensure that they alert the judicial officer to this provision and seek it, where appropriate.

Note: family violence is defined in s168A as an offence against any enactment (including the Family Violence Act 2018) and involving family violence as defined by s 9 of the Family Violence Act 2018 – violence (physical/sexual/psychological) inflicted against a person by any other person with whom that person is or has been in a family relationship with.

When court bail is granted

When court bail is granted to a family violence defendant, you must liaise early with the OC case, Family Violence Coordinator/Family Harm Specialist or OC Intel, advising them of the fact of bail and any conditions. This enables safety plans for the victim, children or other affected people to be established or updated. You must also work with the OC case and court staff to ensure the victim or witness is promptly advised of any change to the defendant's bail conditions or custody status. Often this is completed using the s29 Inform app.

You should:

- carefully consider any proposal for a defendant to be bailed back to the victim's address on a case-by-case basis. Given the nature of family violence offending, **only in exceptional circumstances should the defendant be bailed to the victims address**

- take into account the potential risks of further violence and/or intimidation towards the victim by the defendant.

Seeking bail conditions

When considering what bail conditions to request in family violence prosecutions, where available or accessible consider these factors:

Factors relating to a victim or family	Factors relating to the defendant
• any safety plans in place for the victim • the victim's views • where the victim and children live • where the victim works and socialises • where the family doctor or other relevant medical practitioners are based • where the children go to school or go to on a regular basis • school pick-up times and working hours (if considering curfews) • restrictions on child contact from the Family Court • pending Family Court proceedings that relate to the children (eg. parenting orders, supervised contact and day-to-day care).	• whenever possible, conditions should not prevent the defendant continuing in their usual employment • whether there is a protection order in force • whether conditions would prevent the defendant's attendance at a court–directed assessment and non-violence programme, prescribed service or treatment, including a self-referred programme. **Only in exceptional circumstances should the defendant be bailed to the victim's address.** Eg. the defendant and victim may work together and due to economic circumstances this must continue. In such a case, a condition that the defendant is not to offer violence to the victim would be appropriate

Examples of possible bail conditions

See the examples of appropriate and inappropriate bail conditions in the Deciding whether to grant or oppose bail section of the Bail chapter. In the context of family violence cases, note that:

- a non-association condition may still be required when a protection order is in place, as under the conditions of the order, the victim can invite the defendant back to live with them
- the surrender of passport and travel documents is particularly important if there are issues around breaches of parenting orders or concerns that any children may be taken from New Zealand.

Electronic monitoring on bail

Applications for the defendant to be released on EM bail to the victim's address should generally be opposed. This is because confining the defendant to premises shared with the victim could exacerbate problems in the relationship, leading to further violence towards and/or intimidation of the victim.

Advising victims about bail decisions

The OC case should inform the victim of any information relevant to the case (s12 of the Victims' Rights Act) including bail decisions and any bail conditions relevant to them. You should check to ensure this information has been passed to the victim.

Victims covered by s29 of the Victims' Rights Act are given a POL1065 by the OC case so they can be registered on the Victim Notification Database and be advised of various events relating to the case. The OC case must advise registered victims as soon as practicable:

- when an offender is released on bail (s34 Victims' Rights Act); and
- of any terms or conditions of the release relating to them or their family at that time.

This is the prosecutor's obligation, usually effected by using the s 29 application on your mobility device.

Note: The victim **must** be advised quickly because there are no provisions for the defendant to be held in custody once bail has been granted. This means the defendant must be released as soon as they have been processed (within two hours) and cannot be held until the victim has been contacted.

Variations to bail conditions

Where a defendant seeks a bail variation that may affect the safety or security of the victim or their immediate family every reasonable effort should be made to obtain the victim's views. You should consult the Family Violence Coordinator or Family Harm Specialist if possible and appropriate, especially if you cannot contact the victim, as they often have specialist knowledge of the family situation and can provide advice.

Changes to bail conditions must not compromise the victim's safety and there must always be a very good reason for agreeing to any changes, considering the reasons for the original conditions being imposed. If in doubt, best practice is to put the matter before the court for the judge to consider and make a decision on. Make sure you provide the judge with all the information weighing on your decision.

The victim must be advised of any changes to the bail conditions (s34 Victims' Rights Act) that relate to the safety and security of the victim or of their immediate family, or require the defendant not to associate with the victim and/or their family.

Be aware of these common ploys to obtain variations to bail conditions:

- prosecutors being played off against each other (eg. finding a prosecutor who has a more favourable view of the defendant's issues)
- the defence:
- applying for a variation at a court where the case and its history are not known
- having the victim or the victim's family accompany them when making an application to vary conditions.

To address these tactics, ensure that clear notes are recorded on the prosecution coversheet noting the variation requested and reasons for refusal. If a bail variation is applied for at court without notice, inform the judge of this and ask the judge to either stand the matter down for enquiries to be made or ask for another hearing to be scheduled or the matter to be dealt with by way of a bail variation request on the papers, if appropriate.

Breaches of bail conditions

Breaches of bail must be treated seriously. Depending on the seriousness of the breach and whether it fits one of the criteria in section 8(1)(a) and (3) of the Bail Act, or more significantly, restrictive provisions in the Bail Act that shift the onus, you should generally oppose bail and seek a remand in custody.

The victim is not the subject of the bail conditions, the defendant is. However, take care to ensure that it was not the victim who initiated the contact that breached the bail condition. The defendant is responsible for complying with any conditions imposed by the police or the court until released from those conditions by the court.

When a person has been arrested for breach of a bail condition, seek a certified record of non-performance of a bail condition (s39 of the Bail Act) - this is whether further bail is opposed or not. The court can note the non-performance on the back of the bail notice and instruct the registrar to enter a record of this event in the criminal records kept under s184 of the Criminal Procedure Act 2011. This information can then be used in subsequent bail applications and oppositions. It is important to note the court will certify only serious breaches that may lead to a failure to comply with one or more of the three primary considerations in s8(1) of the Bail Act.

File standards

General requirements for file content

Family violence prosecution files must be prepared by the OC case in accordance with the Prosecution file and trial preparation chapter and should contain information:

- accurately reflecting the facts of what occurred and providing context
- supporting any element of premeditation or persistence in the defendant's behaviour
- proving the defendant's intent
- reflecting the severity of any injury suffered by the victim
- identifying any known issue(s) with the case and what steps have been made to remedy the issue(s).

Specific file content for family violence prosecutions

Each family violence case file prepared by an OC case -

should contain:	**may also contain:**
• POL 258 covering report detailing recommendations about diversion and bail (including updated opposition to bail if relevant) with sufficient detail • a copy of the charging document for each charge • a summary of facts x3 • criminal and bail history x3 • signed formal statements compliant with s82 Criminal Procedure Act 2011 • a copy of notebook statements or signed job sheets • corroborating evidence • communications centre chronology and tape transcripts • medical reports • an exhibit sheet • initial and subsequent forensic photographs of the scene and victim's injuries • family harm or other investigation • NIA printouts, including family violence history and profiles • a victim impact statement that includes whether victim consents to a protection order being applied for on their behalf • defendant's statement or DVD interview (with synopsis) • victim's views on bail • Court Services Victim Referral (CSV1) • Family Violence Summary Report (defendant) generated from NIA for first appearance (as per local arrangements – national rollout underway).	• a supplementary sheet outlining further circumstances of the investigation • body maps showing marks and injuries for both parties, if applicable • medical release forms, where appropriate • children's details • corroborating signed statements or reports from Oranga Tamariki, the local school or neighbours • audio recordings from a Police communications centre or family violence alarm.

All this information should be provided in a correct and complete form with evidence that the file has been reviewed and signed off by a File Manager and/or the OC case's Supervisor. The file should be sufficiently prepared to support the presentation of the case at court.

All items featuring relevant physical evidence (eg. bloodied clothing or weapons) that are seized and retained to be used in court should be noted on the exhibit sheet attached to the file and on the POL 258

The OC case should check whether a POL 1065 has been submitted and entered onto the system using the online Victim Notification Query facility.

Corroboration

Corroboration is particularly important if any key witness, including the victim, becomes a reluctant witness. Because of the dynamics of family harm and fears for their own and their children's safety, it is not uncommon for victims of family violence to become reluctant witnesses and ask for charges to be withdrawn. Frontline staff must be prepared for this and collect evidence that will support prosecution should this occur. A robust prosecution takes extra pressure off victims. The more evidence we have the more likely it is for a prosecutor to resolve the matter prior to or at a case review hearing. It is also up to the prosecutor to request further investigation from the OC case to assist with a successful conviction.

The prosecutor should check for sources of information that may corroborate a victim's allegations, such as:

- medical examinations and doctor’s reports (of suspect and victim)
- photographs of injuries
- scene examination evidence, including any photographs and scene diagrams (consider use of ESR forensic scientists for serious offences)
- clothing
- witness statements (tamariki, neighbours, friends, colleagues, emergency medical staff) – obtain full details and statements. Exhaust all lines of enquiry.
- 111 call - obtain a copy from the Comms Centre for court
- observations of arresting officer
- SAFVR and total concern for safety measures
- old Family Violence Investigation Report ratings, previous family violence reports and previous ODARA scores
- emails, text messages, phone records
- admissions or other corroborating or damaging statements by a suspect
- other expert witness evidence.

Corroborating evidence can also be gathered from Oranga Tamariki, schools and neighbours. The prosecutor advises the OC case of the need to gather further evidence when necessary. Whilst discussions about further evidence might be in person or through email, it is important that any directives regarding further enquiries be tasked in NIA – as per the PPS File Grading Policy.

Prosecuting for breaches of protection and related property orders

About protection orders and related property orders

See the Protection and related property orders chapter for information generally about:

- the purpose of protection orders and related property orders
- when they can be issued
- the standard non-violence and non-contact conditions of protection orders. (Note that from 1 July 2019, all protection orders – including ones granted before then – will have additional standard conditions and changes to the meaning of terms used in the order).

Defences to breaches of protection orders

For legal guidance refer to the Westlaw Commentary, for the mens rea (intent) requirements and defences to breaches of protection orders.

Note: Diversion for breaches of protection orders or related property orders must not be considered in any circumstances.

Not complying with a direction to undertake assessment and attend a non-violence programme / prescribed service (Family Violence Act 2018)

See 'Non-violence programmes and prescribed services' - (Family Violence Act 2018).

Validity of orders made under the Domestic Protection Act 1982 and Domestic Violence Act 1995

Final non-violence and non-molestation orders made under the Domestic Protection Act 1982 that were valid when the Domestic Violence Act 1995 came into force (on 1 July 1996) or were made final after that date are deemed to be protection orders under s133 of the Domestic Violence Act 1995.

The old final non-violence orders remain valid until they are discharged by the court. Care needs to be taken with final non-molestation orders, because s17 of the Domestic Protection Act provided that such orders ceased to have effect if the parties lived together with the consent of both parties. The key question is whether the order was still in force as at 1 July 1996. Section 133 of the Domestic Violence Act should be checked to see if it applies.

Protection orders made under the Domestic Violence Act remain in force as per the Family Violence Act 2018 clause 3 of Schedule 1. After the changeover from the Domestic Violence Act 1995 to the Family Violence Act, an order or direction made under the 1995 Act before, and in force on, the changeover date (1 July 2019) continues to be in effect but with the new Family Violence Act 2018 provisions applying.

Under s 133 of the Domestic Violence Act, any final non-violence and non-molestation orders made under the Domestic Protection Act 1982 that were valid when the Domestic Violence Act came into force (1 July 1996) were deemed to be protection orders. Therefore under the new Family Violence Act, these will still be valid protection orders, subject to the Family Violence Act provisions.

See the 'Protection and related property related orders' chapter for details of the new conditions applying retrospectively to orders in place at 1 July 2019.

Accepting pleas and diversion

Arrangements as to charges

In some cases, a defendant may indicate the possibility of their pleading guilty to a different or lesser offence than that with which they are charged. This could arise, for example, if a defendant indicates an intention to plead guilty to some but not all of the charges, or because new evidence comes to light.

Follow these steps if considering acceptance of a plea.

Step	Action
1	Consider any approach defence counsel makes to review a charge. Note that: • evidence must support the charge and the charge must fairly represent the conduct • the accused must admit guilt • the court has the ability to pass a sentence on the charge that reflects the seriousness of the offending • where a breach of protection order is alleged, it is not appropriate to withdraw an assault charge for a guilty plea to the breach charge. It may however be appropriate to use a representative breach of protection charge for an ongoing physical assault arising out of one incident. Plea arrangements for breach of protection order charges should be very carefully considered and step 2 should be followed strictly to ensure the safety of the victim.
2	Whenever possible, consult with the OC case, the Family Violence Coordinator/Family Harm Specialist, the District Prosecution Manager and the victim when determining whether to accept a plea. This is done so that the PPS position can be explained to them and their views obtained. Ensure you make clear notes on the prosecution case also should any questions arise at a later stage.
3	Make the determination to accept or reject an arrangement. You may accept a plea to a different or lesser offence than that with which they are charged, if you believe the court can pass a sentence that reflects the seriousness of the offending. (Arrangements can be revoked in the future, if it is in the interests of justice). Record all outcomes and discussions on the prosecutor notes section of the prosecution cover sheet. This will assist if the decision making process is later questioned.

Matters to consider when accepting pleas

You are responsible for determining the prosecution position in respect of charge arrangements, consistent with the requirements of the Solicitor-General's Prosecution Guidelines which include these matters:

- a prosecutor:
  - may indicate to counsel a willingness to consult concerning disposition of the charges by plea
  - must not speak to a defendant directly about charge resolution. Where a defendant is self-represented, any question of appropriate charges should be dealt with by way of a request for a sentence indication as part of a case review hearing
- any plea arrangement must be recorded in a form capable of being placed before a court, which would be a case management memorandum for cases scheduled for a case review hearing (see the Criminal procedure – Review stage chapter)
- the victim/complainant must be informed of any plea discussions and given sufficient time to make their position known
- the summary of facts must reflect the charges filed and must not contain or omit any material fact for the purposes of plea arrangement
- to proceed with an arrangement the evidence must support the charge (and there must be no evidence contrary to the charge), the charge must fairly represent the criminal conduct and the accused must admit guilt. No plea

arrangement may be concluded where the nature of the offending or alleged offender is such that it is clearly in the public interest that the matter proceeds on the basis of the charges filed

- the prosecutor must not:
  - agree to promote or support any particular length of sentence
  - over-charge to obtain an arrangement.

Withdrawal of charge arrangements

The prosecutor may not depart from an arrangement unless they have been materially misled by any information (from any source) as to the facts relied on in the plea discussions and the DPM agrees that it is appropriate in the circumstances to repudiate part or all of the arrangement. When this occurs, a defendant usually claims an abuse of process for the PPS reneging on the arrangement. However, it is lawful for the PPS to revoke an arrangement made by an OC case or prosecutor if it is in the interests of justice to do so (see *Fox v A-G* [2002] 3 NZLR 62; (2002) 19 CRNZ 378 (CA)). This option, however, should be exercised with discretion and you must have approval of the District Prosecution Manager or higher line authority.

You must not agree to withdraw charges for breaching a protection order or related property order as part of a charge arrangement for a guilty plea to other family violence charges. A guilty plea to a family violence offence committed when a protection order or related property order was in place potentially adds weight to the prosecution for breaching the protection order or related property order itself.

Diversion

Refer to the Adult Diversion Scheme Policy.

Case review

Prosecutors to review case and make final decision on prosecution

Prosecutions must only be conducted when the test for prosecution as detailed in the Solicitor-General's Prosecution Guidelines (mandatory compliance) is met. This means there is both sufficient relevant and reliable evidence and the prosecution can be sustained in the public interest. Prior to a case review, a prosecutor considers these factors against the weight of evidence prepared by the OC case. See the Criminal Procedure - Review stage chapter for further details.

Three stages of case review

There are three key stages of the case review process:

- identification of family violence cases and liaison with the OC case
- file evaluation
- checking to ensure process has been followed.

Identifying family violence cases

The prosecutor:

- identifies and marks family violence cases if it is not correctly identified on the charging document
    - works with the OC case to ensure:
    - proper evidence is collected (see File standards in this chapter which includes information on corroboration)
    - the victim is safe and appropriately supported, and has the confidence to give evidence, if required. (The victim may be the only witness, especially when the offending occurs in private, and will have to give evidence in court, unless the defendant pleads guilty or there is strong supporting evidence)
- confirms whether the witness wishes to give evidence in an alternative way, which may enhance their willingness to give evidence. This needs to be signalled with PPS early so the necessary applications can be filed with the court. Note that a 'family violence complainant' is **entitled** to give their evidence in chief by a video record. Notice must be given no later than when a CMM (for a Judge-alone trial) or a trial callover memorandum (for a jury trial) is filed
- explores what other corroborating evidence there might be (that is admissible, relevant, and satisfies all offence ingredients) to relieve the victim of the need to give evidence.

File evaluation

Case file evaluation, involving prosecutors checking to ensure all the essential information, forms, applications and protocols have been prepared and/or actioned, is standard practice for all case files sent to the PPS. It provides an integral independent assessment within the Police prosecution process, and is an essential reviewing phase before the first court appearance. Often there is a lot of pressure to prepare a file for court. The OC case should liaise with the prosecutor if this is the case to avoid frustration and ensure transparency.

These are important factors to consider with prosecuting family violence offending:

Factors to consider	Check or note that:
File quality	The effective prosecution of family violence cases saves lives. The quality of the file reflects the opportunity a prosecutor has to effectively manage a case. Prosecution files **must** be of a high standard to reflect professionalism, increasing trust and confidence of victims and sector partners.
Investigation thoroughness	All efforts have been made to collect independent evidence that can corroborate the victim's evidence.
Charge appropriateness	The charge reflects the facts and evidence and it does not default to a lesser or more serious charge out of customary practice.
Bail	Opposition to bail is processed properly and any continuing risk to the victim is clearly articulated (remembering that the court's primary consideration under s 8 is the need to protect the victim of the alleged offending), as are the victim's views if justified pursuant to section 29 of the Victims' Rights Act.
Evidential admissibility and relevance	The best evidence capable of supporting the charge(s) together with, but possibly independent of, the victim's evidence has been gathered.
Case resolution options	The best options for bringing the offender to account and ensuring the victim's views and safety have been considered.
Victim safety and support	The episodic nature of family violence has been taken into account to ensure the victim will be protected and the appropriate support has been provided.
Evidence Act	Alternative ways of giving evidence (under the Evidence Act) have been considered and all the evidence is available to the court.

Checking to ensure process has been followed

In addition to checking the correct type of information is in the case file, check the OC case has:

- included in the file a summary of relevant family violence information from NIA (Query History All and Family Violence Reports) and/or from multi-agency table case management (eg. living arrangements or whether a protection order is being sought)
- prepared the initial disclosure properly, taking care to ensure the disclosed documents do not contain the victim's address and contact details (see the Criminal disclosure chapter).
- filed the Summary of Facts and Court Services Victim Referral (CSV1) form at court, preferably when the charging document was filed.

NOTE: professionalism is a core value. Any document that is disclosed will come under scrutiny and reflect the professionalism of the Police

Differences of opinion

Fundamental differences of opinion between a prosecutor and an OC case should be managed professionally and, when appropriate, advice obtained from supervisors (PPS and operational).

If a dispute arises on a matter of law, seek independent legal advice from your district's Legal Service Centre to resolve the conflict.

Note: If the evidential test is not met, the prosecution cannot be continued. It is reliant on frontline staff to gain the evidence required. **Continuing prosecutions that do not have a reasonable prospect of conviction places the organisation at risk of costs awards.**

Supporting victims and witnesses to give evidence

Initial interactions with the victim or witness

Many victims and witnesses will be experiencing the court process for the first time. This, coupled with the fear of facing the defendant, can make the court appearance a frightening experience. The physical layout of the court can also be intimidating, particularly when victims and witnesses have to sit near the defendant's family, supporters or witnesses.

You should meet with the family violence victim or witness before the judge-alone trial, because of the inherent tension they may feel in giving evidence against a spouse or partner. Establishing contact before the proceedings will give the victim or witness confidence and a better understanding of the court and prosecution process. It may also give you an indication as to whether a witness is likely to be hostile. Arrangements can also be made with the court to show victims and witnesses ahead of time what a court room looks like. This can be particularly beneficial where proceedings are set down to be heard at trial.

You should be familiar with ways to help vulnerable and intimidated witnesses (including children) give their best evidence. See information on giving evidence in alternative ways in the 'Investigative interviewing witness guide'.

Support for victims in court

Prosecutors work with the OC case to ensure the victim is safe and the contribution of external service providers (eg. Women's Refuge and Victim Support) to victims is well directed and appropriate. When specific concerns have been identified, liaise with the OC case and/or the Family Violence Coordinator/Family Harm Specialist to consider the best options for appropriate support.

Protection and safety of victims and witnesses

Victims and witnesses in family violence cases may be coerced, threatened, and intimidated. Just attending court and facing the defendant is traumatic for many victims and witnesses. When the defendant has not been kept in custody, victims and witnesses may fear meeting the defendant (and their family and supporters) before the hearing. The OC case should brief the prosecutor about any safety procedures that have been put in place for the victim and family, so safety is not inadvertently compromised.

The victim and any support people can be located in secure rooms at the court immediately before and after the hearing if their safety is at risk. The prosecutor and/or OC case should liaise with the CVA before the hearing date to arrange this facility on the victim's behalf.

Victim's location and/or residential whereabouts

Section 16 Victims' Rights Act restricts the victim's precise address (including postal address, email address, fax number, or phone number) from being given in evidence or in information provided to the court.

In some family violence cases, the victim and any dependants may have to reside somewhere unknown to the defendant. Some serious investigations may necessitate the victim being relocated in another country or re-established elsewhere in New Zealand. District Prosecution Managers must ensure that no information is divulged by or through PPS staff that could lead to the victim's whereabouts being discovered and their safety compromised.

Alternative ways of giving evidence

See:

- 'Alternative ways of giving evidence' in the Investigative interviewing witness guide, and
- 'Ways of giving evidence' in the Victims (Police service to victims) chapter.

Note that there is a presumption that a child witness (a person under the age of 18 years) will give evidence in an alternative manner (s107 Evidence Act 2006). This must be notified to the court at case review hearing, and can be done on the Case Management Memorandum.

Limitations on self-represented defendant

If the defendant is representing themselves, they are **prohibited** from directly cross-examining a complainant or child witness in a sexual or family violence case (s95 Evidence Act).

Reluctant or hostile witnesses

Dealing with reluctant witnesses

Because of the dynamics of family violence, some witnesses (particularly victims) will be reluctant to give evidence and withdraw their support for the prosecution. You must take a considered approach toward dealing with reluctant witnesses and balance the need not to re-victimise the witness with the need to stop future violence by holding the offender accountable. Generally, you should seek to continue a prosecution where the evidence is available and it is in the public interest to do so.

When the offending is serious (ie. has significant public interest) and the evidence is strong, the presumption is that the family violence prosecution will proceed despite the witness' wishes. The degree to which a witness will be required or compelled to give evidence will relate to the facts of the case.

In very serious cases, the prosecutor should consider whether calling an expert witness to provide evidence as to why family violence witnesses recant or minimise may be required. The National Family Harm Team can provide contact details for expert witnesses.

Adjournment, withdrawal, and dismissal of proceedings

In cases where you cannot proceed with a case, because a witness has refused or failed to appear, you should try the following options:

Option	Action
1	Stand the case down or seek an adjournment of the matter from the court (to locate the missing witness).
2	Seek a warrant for the missing witness and set appropriate bail conditions when they are brought before the court to ensure their attendance at the judge-alone trial (note this approach can be a double-edged sword so consider whether the charge justifies this approach)
3	If the court will not grant an adjournment or issue a warrant, seek leave to withdraw the charge unders146 of the Criminal Procedure Act.
4	If the court will not grant an adjournment or withdrawal of the charge, or issue a warrant, the most likely outcome is that the charge will be dismissed under s147 of the Criminal Procedure Act. There is no scope for such a dismissal to be deemed ‘without prejudice’, and accordingly the charge will not be able to be re-filed in the future.

Indication of reluctance prior to court

When a witness indicates reluctance prior to court you should:

- consider the issues behind their reluctance to make a statement and/or desire to change a statement
- consider having the OC case investigate the witness’ change in position
- assess **options for the prosecution** with the OC case including:
    - summonsing the witness to appear and give evidence
    - explaining the authority to seek a warrant to arrest before the hearing
    - helping the witness give evidence using an alternative way of giving evidence – (this must be approved by the court)
    - applying to have the witness’s statement read in court in absentia if the witness is genuinely unavailable (ie. admitted as hearsay)
    - prosecuting on the basis of the original statement made to police together with corroborative evidence (ie. photos) if the witness intends to give ‘hostile’ evidence.

Investigating a witness’s change in position

When deciding what prosecution option to take, consider having the OC case speak to the witness to confirm whether they

have withdrawn their support and request that a POL 258 report be prepared explaining:

- the reasons for withdrawing support for the prosecution
- whether the complaint (and original statement) was true
- whether the witness has been pressured to withdraw support
- any other relevant factors.

Police should **not** take subsequent withdrawal statements because:

- they undermine the prosecution/investigation work already completed or underway toward proving the charge/s filed by Police
- the grounds set out are usually highly questionable when viewed alongside the available evidence obtained in the initial investigation
- the emotional grounds often cited (separation, finance, impacts on family) are not a basis to do so.

If there proves to be a material difference between the witness' original complaint and subsequent retraction, obtain the views of the OC case (or the Family Violence Coordinator/Family Harm Specialist if the OC case is not available) about the evidence and the possible implications of requiring the witness to give evidence. The OC case may need to assess the risks to the witness and any child or other affected person, so that a comprehensive picture can be obtained.

If you suspect the witness has been pressured or coerced into withdrawing the complaint, ask the OC case to investigate. This may reveal further offences, eg. harassment, witness intimidation, a breach of bail conditions or attempting to pervert the course of justice.

If the witness confirms the original complaint is true but wants to discontinue prosecution, assess whether the prosecution can proceed without their evidence (evidential sufficiency) and, if so, whether it should proceed against the witness's wishes (public interest).

In rare cases, if, after a full investigation, it is clear that a false statement has been made by a victim, the District Prosecution Manager and Family Violence Coordinator/Family Harm Specialist must be consulted prior to any charging documents being filed.

Using hearsay evidence without calling the witness

The law allows the use of the witness's statement in court without calling the witness (s18 of the Evidence Act), but only in limited circumstances, eg. where the witness is genuinely unavailable (within the meaning of s16(2) of the Evidence Act). The court ultimately decides whether a hearsay statement will be admissible even though the witness will not be available for cross examination. In practice the court is likely to admit such evidence if there is strong corroborative evidence, which supports the truth of the hearsay statement.

Failure to appear in court

When a witness fails to appear in court or avoids service of a summons, you should if possible, have the case stood down to make enquiries and assess the situation to determine in consultation with the OC case whether the prosecution should proceed as per normal policy and procedure. Also consider whether seeking a warrant is appropriate.

Having a victim or witness declared ‘hostile’ when giving evidence

It is not uncommon in family violence cases that the witness changes their evidence while under oath. Consider asking the court to declare the witness hostile in accordance with section 94 of the Evidence Act. This is usually preferable to withdrawing charges.

You can then properly cross examine the witness including introducing a previous inconsistent statement made by them (taken at the time of the offending) to prove the truth of its contents. You should refer the witness to the prior inconsistent statement and get them to confirm that they did make the statement (or confirm their signature on the statement). If they do not adopt the statement as true, seek leave of the court to introduce the prior inconsistent statement into evidence.

If, coupled with corroborating evidence (eg. photos of bruising), the prior inconsistent statement may be considered proof

beyond reasonable doubt of the offence before the court, you may invite the court to reject a hostile witness's evidence on oath as not credible, and adopt the initial statement as the true version of events.

When Court does not find witness to be hostile

It is also not uncommon in family violence cases where witnesses change their version of events and are not declared hostile by the Court. In these circumstances consideration should be made to apply the Supreme Court Decision of *Hannigan v R* [2013] NZSC 41.

This will not allow cross examination but will allow explanatory questions into material difference between sworn testimony and prior statement. Again, if they do not adopt the statement as true, seek leave of the court to introduce the prior inconsistent statement into evidence.

In both cases of hostility and *Hannigan* approach, the officer taking the statement should be available to give evidence.

In the decision of *R v Toru* [2018] NZHC 1144 at paragraph 25 the Court stated about complainants recanting:

[25] Domestic violence is a pervasive scourge affecting New Zealand society. The victims are not only those, mostly women, who suffer physical, psychological and sexual abuse within a relationship, but also the extended families and especially children who are psychologically and emotionally, if not physically, scarred by it as well. A recurring phenomenon in the attempts by Police and the Crown to prevent and deter domestic violence is the recanting complainant. I can readily take judicial notice of the circumstances in which complainants wish to withdraw complaints of domestic violence because, although they want the violence to stop, they would rather continue in a potentially violent relationship than live without their abusive partner. In some cases, complainants recant out of fear of retaliation, and in others out of feelings of guilt (often misguided) that they have contributed to the causes of the abuse.

The Court further stated at paragraph 29:

[29] Section 89 of the Evidence Act contains a general prohibition on the use of leading questions in examination-in-chief or re-examination. Although the Supreme Court decision in Hannigan v R did not arise in the context of domestic violence prosecutions, the potential relaxation of the restriction against asking leading questions in examination-in-chief also increases the options available to a prosecutor when confronted with a reluctant or recanting complainant.

Requiring witnesses to give evidence

The legal provisions for dealing with witnesses who refuse to be sworn or give evidence are in section 165 (witnesses refusing to give evidence may be imprisoned) of the Criminal Procedure Act.

In a leading case on the requirement to give evidence, *Beckett v Jaffe and Evans* (1989) 4 CRNZ 248, Justice Hillyer said (at page 252):

There is an obligation in this country on every citizen to give evidence in our Courts when required to do so. To refuse is an offence.

For a witness not to give evidence they must convince the court they have 'just cause or excuse' for not doing so. Therefore, the prosecutor must have considered all the issues of the case and be prepared to argue that the witness does not have a 'just cause'.

Compelling a spouse or partner

The Evidence Act has removed spousal immunity from the law. This means a victim who is the spouse of the offender can be summonsed to appear as a witness and be compelled to give evidence. It is also likely that section 165 of the Criminal Procedure Act also ceases to provide the same level of immunity for people in a committed relationship (including a civil union, or a de facto relationship between people of the same or opposite sex), because the Evidence Act gives a clear statement of Parliament's general intention in this area.

Warrants or orders made under the Care of Children Act 2004

Relevance of the Care of Children Act to family violence

The Care of Children Act replaced the Guardianship Act 1968. It modernised the law about the care of children, recognising that many families are not traditional nuclear families, and the responsibility for children is sometimes borne by people other than the child's biological or adoptive parents.

Several provisions in the Care of Children Act relate to situations that might involve family violence. This is where the care or contact arrangements for a child or children have become part of the family violence dynamic.

The prosecutor:

- locates the offence within the context of other family violence offending – is this offence part of a pattern of family violence offending?
- considers the safety of the child or children when deciding whether to prosecute.

Warrants

The Care of Children Act provides the court with the power to issue warrants for police or other specified people (including social workers) to undertake several activities on behalf of a child or children, including warrants to:

- enforce the day-to-day care or contact arrangements for a child
- prevent the removal of a child from New Zealand
- prevent the concealment of the whereabouts of a child (by uplifting the child to a safe and secure environment)
- enforce the return of a child to the appropriate parent or caregiver.

Parenting orders

Under the Care of Children Act parenting orders replace custody and access orders. 'Custody' has become 'day-to-day care', and 'access' has become contact'.

A parenting order is an order made by the Family Court that says who is responsible for the day-to-day care of a child, and when and how someone who is important in the child's life (usually the other parent) can have contact with them. Both parties are given a copy of the parenting order, which clearly and simply explains the requirements of the order.

Courts prefer parents or caregivers to make care arrangements for children themselves and will grant orders only if the parents or caregivers have made a serious effort to reach agreement but have failed to agree on care arrangements.

Parenting orders are a clear indication that the court considers this type of order absolutely necessary.

While only some breaches of parenting orders involve family violence, it is essential that when they do, the safety of the child is a key consideration in any deliberations regarding prosecution.

Key areas of Care of Children Act

Orders and warrants

This table outlines orders and warrants made pursuant to orders that may be relevant to prosecutors in the context of family violence.

Provisions	Explanation
Section 48	Granting of parenting orders - Order determines care arrangements for a child that include day-to-day care and contact arrangements.
Section 72	Warrants for enforcing day-to-day care - Pursuant to a parenting order.
Section 73	Warrants for enforcing contact - Pursuant to a parenting order.
Section 77	Warrants issued for the purpose of preventing the removal of a child from New Zealand - Issued where it is feared a child may be removed from New Zealand by a person (usually one of the parents).
Section 117	Warrants to prevent the concealment of the whereabouts of a child - In situations where a child has been abducted to New Zealand (and it is feared that a person will attempt to conceal the child) the court can issue a warrant empowering police to take and deliver a child to a suitable person pending an order being made to return a child to their home country.
Section 119	Warrants enforcing an order for the return of a child - Empowers police to take and deliver a child to any person named in the warrant, where an order has been made to return an abducted child to their home country.

Offences

This table outlines key offences relevant to prosecutors in the context of family violence.

Provisions	Explanation
Section 78	***Contravening a parenting order*** **Test**: Any person who, without reasonable excuse, intentionally contravenes, or prevents compliance with, the parenting order. **Penalty**: Maximum three months' imprisonment or a fine not exceeding $2,500.
Section 79	***Resisting execution of a warrant*** **Test**: Any person commits an offence if they knowingly resist or obstruct any person executing a warrant under ss 72, 73, or 77. (Note that ss 117(4) and 119(4) extend the application of s 79 to resisting the execution of a warrant granted under ss 117 and 119.) **Penalty**: Maximum three months' imprisonment or a fine not exceeding $2,500.
Section 80	***Taking a child from New Zealand*** **Test**: Any person commits an offence who, without leave of the Court, takes or attempts to take a child out of New Zealand: • knowing that proceedings are pending or about to be commenced under the Act in respect of the child; or • knowing there is an order giving any other person the role of providing day-to-day care for, or contact with, the child; or • with intent to prevent an order about the provision of day-to-day care, or contact, being complied with. **Penalty**: Maximum three months' imprisonment and/or a fine not exceeding $2,500.

Further information

Contact prevention staff in your district or at Police National Headquarters if you require any further information about responding to incidents involving warrants or orders made under the Care of Children Act.

Sentencing

Prosecutor's responsibility at sentencing

The prosecutor must ensure that the court has all the information it needs to sentence appropriately including:

- a list of the offender's previous convictions
- SAFVR and total concern for safety measures
- an up-to-date victim impact statement, (if available)
- written sentencing submissions (where appropriate).

Sentencing submissions

The Police Prosecution Service Written Submissions Practice Note 2011 sets out when a written sentencing submission is required. The Sentencing Practice Note 2014 (applies in the High and District Courts) details the factors that should be included in a sentencing submission. In family violence cases, any SAFVR and total concern for safety measures should also be included (as relevant).

In all cases where defendants are convicted of family violence offences, you should consider preparing a written submission taking into account the nature and/or seriousness of the offending. Provide the court with an up to date victim impact statement and draw the court's attention to any aggravating or mitigating factors particular to the case and consistent with the characteristics of family violence offending.

You should challenge any assertion by the defence that is inaccurate, misleading, or derogatory. Refer to Westlaw.

Victim impact statements

See information on victim impact statements in the Victims (Police service to victims) chapter.

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